Supreme Court, U.S.
FILED

No. 05-1465 MAY 16 2006

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IN THE

Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

ACADEMY OF MEDICINE OF CINCINNATI, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court that is applying the Federal Arbitration Act adopt a distinct test for the arbitrability of statutory and tort claims that considers only whether the elements of those claims reference the parties' contract and ignores whether they "touch matters" within the scope of the parties' arbitration agreement?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Ohio Supreme Cour were plaintiffs-appellees Academy of Medicine of Cincinnati Butler County Medical Society, Luis Pagani, M.D., Pau Jennewine, M.D., Bradford H. Woodall, M.D., Willian Randall Cox, M.D., and Newton H. Bullard, M.D., an defendants-appellants United HealthCare of Ohio, Inc. Community Insurance Company d/b/a Anthem Blue Cros and Blue Shield and Aetna Health, Inc. The Ohio Suprem Court dismissed Aetna and Anthem prior to issuing it decision.

This petition is being filed on behalf of United HealthCar of Ohio, Inc. No publicly held companies own 10% or mor of United HealthCare of Ohio, Inc. United HealthCare o Ohio, Inc. is owned 100% by United HealthCare Service Inc., which in turn is owned 100% by UnitedHealth Grou Inc., a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to halt a growing trend in which state courts are determining the arbitrability of statutory and tort causes of action using a test that egregiously undermines the Federal Arbitration Act's policy favoring arbitration and the Court's arbitration precedent. By focusing restrictively on whether the elements of a claim reference the parties' contract, and not on whether the claims "touch matters" within the scope of the parties' arbitration agreement, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985), the Ohio Supreme Court disregarded the intent expressed in the language of the parties' agreement to arbitrate. The court recognized that the agreement was broad, encompassing all disputes related to the parties' business relationship. Yet, the court held that state antitrust claims could not be arbitrated because the elements of those claims did not reference the contract at issue—even though the contract embodied the precise price-fixing

conspiracy alleged as the antitrust violation. Under the Ohio court's contract-reference reasoning, parties may evade their arbitration obligations through artful pleading and semantics, even when the substance of a claim unquestionably touches matters within the scope of the parties' agreement to arbitrate. The Court should determine whether the FAA and this Court's established arbitrability principles permit that result.

Ohio's dangerous distortion of federal arbitration law is compounded by Kentucky's adoption of the same test. See *Anthem Health Plans of Kentucky, Inc.* v. *Academy of Medicine of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, 2004 Ky. App. LEXIS 315 (Ky. App. Oct. 29, 2004), review denied *sub nom Anthem Health Plans of Ky., Inc.* v. *Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006). Because these two cases present the same arbitrability question and, together, demonstrate a growing state-court trend, United is simultaneously filing a petition for writ of certiorari in the Kentucky case that reiterates the arguments in this petition.[1]

The Ohio and Kentucky decisions assail the fundamental premise of the federal arbitration system, which requires courts to respect and enforce contracting parties' agreements not to litigate particular categories of disputes by designating them for arbitration. In adopting a constrictive test for the arbitrability of statutory and tort causes of action, the Ohio and Kentucky courts ignored the Court's consistent directives that, under the FAA, arbitration agreements must be implemented according to their negotiated terms, that they must be interpreted with a presumption in favor of arbitrability, and that broad arbitration agreements must be faithfully enforced to effectuate their liberal scope, rendering arbitrable all dis-

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[1] See Petition for Writ of Certiorari, *United HealthCare of Ohio, Inc.* v *N. Ky. Med. Soc.* (No. 05-___).

putes with allegations that touch matters covered by the arbitration agreement. See, *e.g.*, *Mitsubishi*, 473 U.S., at 625-626 & n.13.

Moreover, the Ohio and Kentucky decisions directly conflict with the Court's explicit recognition of the arbitrability of statutory causes of action in *Mitsubishi*, 473 U.S., at 614 (international antitrust claims), *Shearson/ American Express, Inc.* v. *McMahon*, 482 U.S. 220, 238, 242-243 (1987) (RICO and §10(b) Securities Exchange Act claims), *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act claims), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401, 407 (2003) (RICO claims). And the Ohio and Kentucky decisions also specifically conflict with the Second Circuit's analysis of the arbitrability of price-fixing conspiracy claims, in particular, in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163 (CA2 2004).

Under Ohio and Kentucky's unsupportable arbitrability approach—which implements a standard previously applied by Texas and South Carolina courts as well—these courts now treat arbitration agreements differently than other state and federal courts whenever litigants bring statutory and tort claims without explicitly referencing the parties' underlying contract. This rule not only puts Ohio and Kentucky at odds with other jurisdictions, but also invites gamesmanship and forum shopping. The Court should grant the petition to protect arbitral rights and halt the end run around arbitration reflected by this growing state-court trend.

OPINIONS AND ORDERS BELOW

The Hamilton County Court of Common Pleas refused to compel arbitration or to dismiss or stay the proceedings in an unpublished order. App. 1a. The Ohio Court of Appeals affirmed the trial court in a decision reported at *Academy of Medicine of Cincinnati* v. *Aetna Health, Inc., Inc.*, 800

N.E.2d 1185 (Ohio App. 2003), *aff'd*, 842 N.E.2d 488 (Ohi 2006). See App. 6a. The Ohio Supreme Court affirmed th court of appeals in an opinion reported at *Academy o Medicine of Cincinnati* v. *Aetna Health, Inc.*, 842 N.E.2d 48 (Ohio 2006), App. 12a, and denied reconsideration in a unpublished order, App. 26a.

JURISDICTION

The Ohio Supreme Court denied a motion for reconsidera tion of its decision on April 26, 2006. App. 26a. The Cour has jurisdiction under 28 U.S.C. §1257(a). See *Cox Broad Corp.* v. *Cohen*, 420 U.S. 469, 480-483 (1975).

STATUTORY PROVISIONS INVOLVED

The enforcement provision of the Federal Arbitration Ac provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The FAA permits parties to petition a court for an order compelling arbitration when another party does not arbitrate as required by an arbitration agreement:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing

that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S.C. §4.

The relevant state antitrust statutory provisions from Ohio appear in the appendix.

STATEMENT OF THE CASE

United HealthCare of Ohio, Inc., enters into provide agreements with physicians and physician groups unde which the providers agree to accept rates established in th contract when they treat individuals covered by health benefi plans insured or administered by United. These contract establish and govern the parties' relationships, including th categories of medical services, claim-reimbursement proce dures, and fee schedules. The provider agreements requir United to reimburse contracting physicians who provid covered services to members of United health plans and se out reimbursement rates for particular types of services.

Each of the respondents in this case is a party to a provide agreement with United. In addition to setting fee schedule that establish the reimbursement rates to be paid for medica services provided to patients covered by United's healtl plans, each contract also addresses the possibility of disagree ments in the course of the parties' relationship by including an expansively worded clause that mandates arbitration o "any disputes about their business relationship." See App. 9a 12a, 22a.

Five physicians practicing in the Cincinnati area and tw local medical societies, acting in a representative capacity filed this state antitrust suit against United and three othe health care companies.[2] The single-count, class-action com- plaint alleges that the reimbursement rates set by the contract containing the arbitration clauses are unreasonably low as a result of a conspiracy among the defendant managed care companies to fix prices in violation of state antitrust law App. 8a; see also OHIO REV. CODE §§1331.01, 1331.04.

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[2] In the trial court, the defendants also included Aetna Health, Inc. Anthem Blue Cross and Blue Shield, and Humana, Inc. Humana was dismissed from the case by the trial court, and Aetna and Anthem were dismissed from the case by the Ohio Supreme Court prior to the issuance of its decision.

As remedies for the alleged wrongdoing, respondents seek an injunction ordering United to cease and desist from the alleged unlawful conspiracy to depress the physician reimbursement rates reflected in the provider agreements and to modify the parties' contracts by setting reimbursement rates at reasonable levels in relation to comparable regional markets. See Pls.' Compl. 11. Respondents also seek damages for the compensation they contend should have been paid beyond the amount of the contractual reimbursement rates they received for providing services. *Ibid.*

Because the allegations center on the parties' business relationship, United and its codefendants invoked §4 of the Federal Arbitration Act, 9 U.S.C. §4, and §2711.03 of the Ohio Arbitration Act, OHIO REV. CODE §2711.03, to compel arbitration of the claims under the parties' arbitration agreements. United and the other defendants also moved to dismiss or, alternatively, to stay the proceedings pending arbitration pursuant to §3 of the FAA, 9 U.S.C. §3, and §2711.02 of the Ohio Arbitration Act, OHIO REV. CODE §2711.02.

The trial court denied the motions, holding that respondents' claims were not arbitrable because the alleged price-fixing conspiracy "does not arise out of or relate to the contracts" between the parties, "nor does it involve disputes about the parties' business relationships." App. 2a. In the trial court's view, the arbitration agreement did not include within its scope any "claims that were independent of any breach of contract." *Ibid.*

The Ohio Court of Appeals affirmed the trial court, reasoning that the antitrust claims were not arbitrable because "[t]he express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements." App. 10a. The court hinged the arbitrability of a claim on whether the claim "could be maintained without reference to the individual provider agreements," and, concluding that the

antitrust claims did not reference the parties' contracts, hel that those claims fell outside the scope of the arbitratio agreements. App. 11a.

The Ohio Supreme Court granted review to determin whether the court of appeals properly considered and imple mented the federal standard for arbitrability in evaluatin respondents' state-law antitrust conspiracy claims. The cour affirmed, agreeing with the court of appeals's contract reference arbitrability test as an accurate reflection of federa law. Purporting to rely on the Sixth Circuit's decision i *Fazio* v. *Lehman Brothers*, 340 F.3d 386 (CA6 2003), th court articulated an arbitrability standard for statutory and tor causes of action that permits a court to ignore the contractua language the parties used to memorialize their agreement t arbitrate. See App. 21a.

Two justices dissented, concluding that the majority had distorted the federal standard for arbitrability, and *Fazio*, by asking solely whether respondents' claims referenced the parties' contract, rather than whether, in accordance with *Mitsubishi*, 473 U.S., at 625 n.13, the claims touch matters that fall within the scope of the parties' broad agreement to arbitrate disputes about their business relationship. See App. 23a. The dissent further noted that the majority's test marked a grave departure from the FAA and established arbitration principles:

> "[A]sking whether the action could be maintained without reference to the contract, is not consistent with either the federal policy or Ohio's policy of favoring arbitration. The appropriate federal standard is whether allegations underlying the claims 'touch matters' covered by the agreements." App. 24a.

The dissenting justices also demonstrated why the antitrust allegations necessarily fell within the scope of the parties' agreement to arbitrate:

> "[I]t is difficult to see how antitrust actions may be maintained against the HMO provider 'without reference to' the individual provider agreements . . . [that] are at the core of the [antitrust] claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint." *Ibid.*

Accordingly, the dissent reasoned, "[t]he antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship' between the physicians and United Healthcare." *Ibid.*

Compounding the effect of Ohio's restrictive arbitrability approach, the Kentucky Court of Appeals adopted the same contract-reference test in a case involving another group of physicians that sued United and other managed care companies, alleging violations of Kentucky antitrust law based on the same rate-fixing theory. *Anthem*, 2004 Ky. App. LEXIS, at *7-*8. Together, the Ohio and Kentucky opinions stake out an approach to arbitrability that, as the dissenting Ohio justices observed, impermissibly deviates from the established "federal standard that inquires whether the allegations underlying the claims touch matters covered by the agreement." App. 24a.

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court's decision contravenes the FAA's strong policy favoring arbitration, as reflected in the arbitrability principles articulated by the Court, including the Court's express recognition of the arbitrability of antitrust claims. By insisting that elements of claims reference parties' underlying contracts as a prerequisite to compelling

arbitration under the FAA, the Ohio test renders nonarbitrable nearly all tort and statutory causes of action, which will almost never refer to or directly depend on an underlying contract. Thus, under the Ohio standard, now adopted by Kentucky as well, the antitrust claims in this case, and statutory and tort claims generally, must be litigated in derogation of the parties' contractual bargains to arbitrate—even under the broadest of arbitration clauses. That contract-reference approach eviscerates the protections afforded to arbitration by the FAA. It also creates an untenable circumstance in which arbitrability under the FAA is treated differently in the state courts of Kentucky and Ohio than elsewhere, encouraging litigants to forum shop to escape their arbitration commitments. Because this case presents an important federal question on which the Kentucky and Ohio decisions conflict with relevant decisions of the Court, and of the federal courts of appeals, the Court should grant the petition. SUP. CT. R. 10(b), (c).

I. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH ESTABLISHED ARBITRABILITY PRINCIPLES ARTICULATED BY THIS COURT AND THE FEDERAL COURTS OF APPEALS.

A. The National Policy Favoring Arbitration Applies Equally to State Courts.

Through the FAA, Congress "reverse[d] the longstanding judicial hostility to arbitration agreements" and "place[d] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S., at 24; see also *Southland Corp. v. Keating*, 465 U.S. 1, 12-13 (1984). Additionally, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S., at 10.

In pursuing its clear objective of ensuring the enforcement of agreements to arbitrate, *Mitsubishi*, 473 U.S., at 625-626, Congress did not limit the applicability of its mandates to federal courts; rather, it expressly rejected the notion that enforcement of arbitration rights might depend on the forum in which they are asserted. *Southland*, 465 U.S., at 15. Indeed, the two problems against which Congress legislated were endemic to state courts: a common-law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. *Id.*, at 14. Congress's purpose in enacting the FAA, therefore, "was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." *Id.*, at 13 (internal quotation marks and citation omitted).

B. Ohio's Arbitrability Standard for Non-Breach-of-Contract Claims Contravenes Fundamental Principles for Analyzing the Scope of FAA-Governed Arbitration Agreements.

The Ohio Supreme Court's test for arbitrability—whether an action can be maintained without reference to the underlying contract—conflicts with the national policy favoring arbitration that is embodied in the FAA and in the arbitration precedent of this Court and the federal courts of appeals. Coupled with Kentucky's adoption of the identical, impermissibly constrictive arbitrability standard, the Ohio decision exemplifies a state-court trend of undermining arbitration of statutory and tort claims in a manner that fundamentally guts the arbitral protections Congress enacted in the FAA, warranting the Court's intervention. See also, *e.g.*, *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875, 876 (S.C. App. 2005) (noting breadth of arbitration clause covering "all disputes, controversies or claims of any kind and nature" but refusing to compel arbitration of business-tort

claims by a borrower against a finance corporation for misus of personal information, concluding that the claims could b "maintained without reference to the contract" between th borrower and the bank); *Loy* v. *Harter*, 128 S.W.3d 397, 403 405 (Tex. App. 2004) (denying arbitration of business-tor claim for breach of fiduciary duty against a company' director and CFO after concluding that the claim "could b maintained without reference to the contract" governing hi employment and was nonarbitrable as unrelated to hi employment relationship).

Although purportedly based on language from the Sixth Circuit's decision in *Fazio*, 340 F.3d, at 386, the Ohic Supreme Court's contract-reference arbitrability standar actually conflicts with the approach of the Sixth Circui and other courts that have faithfully applied *Mitsubishi*'s requirement that parties arbitrate all claims—with nc exception for statutory or tort claims—that "touch matters' within the scope of the parties' arbitration agreements. 47 U.S., at 625 n.13 (requiring arbitration of antitrust claims) Indeed, as the Court has made clear, the FAA's "federa policy favoring arbitration . . . is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S., at 225-226 (quoting *Moses H Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 24 (1983)). "'[W]e are well past the time when judicia suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcemen of the Act 'in controversies based on statutes.'" *McMahon* 482 U.S., at 226 (quoting *Mitsubishi*, 473 U.S., at 626-627).

The Ohio Supreme Court correctly recognized that Ohic courts may—and must—apply the federal arbitrability stan- dard when the party seeking arbitration grounds its request ir the FAA, as did United in this case. But—by creating a distinct test for arbitrability of statutory and tort causes of action—the Ohio court distorted the federal arbitrability

standard in a manner that critically deviates from the FAA's mandates and settled federal arbitration precedent.

Specifically, the Ohio Supreme Court isolated language in *Fazio* that discussed whether an action can be maintained without reference to the contract at issue, erroneously equating that inquiry with the benchmark for arbitrability. App. 19a (citing *Fazio*, 340 F.3d, at 395). As the dissent correctly observed, however, the Sixth Circuit did not limit its arbitrability test to that contract-reference inquiry but, rather, broadly held that arbitration provisions encompass claims "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]." *Fazio*, 340 F.3d, at 395 (quoting *Genesco, Inc.* v. *T. Kalcuchi & Co., Ltd.*, 815 F.2d 840, 846 (CA2 1987)); see also App. 23a (Lanzinger, J., dissenting) ("*Fazio* recognized the true federal standard to be whether allegations 'touch matters' covered by the agreement."). Thus, the Sixth Circuit, contrary to the Ohio Supreme Court, recognized that "[e]ven real torts can be covered by arbitration clauses if the allegations underlying the claims touch matters covered by the agreement." *Fazio*, 340 F.3d, at 395 (original brackets, citation, and quotation marks omitted).

Other federal courts of appeals, consistent with the Sixth Circuit and similarly in conflict with the Ohio and Kentucky courts, have adhered to *Mitsubishi*'s touch-matters test for tort and statutory claims, requiring a "focus on the factual allegations in the complaint rather than the legal causes of action asserted . . . whatever the legal labels attached." *Genesco*, 815 F.2d, at 846 (applying the touch-matters test to determine the arbitrability of tort claims).[3] These courts of

[3] State courts, too, have recognized the propriety of applying the touch-matters test to claims other than breach of contract. See, *e.g.*, *MS Credit Ctr., Inc.* v. *Horton*, — So.2d —, No. 2004-CA-01699-SCT, 2006 WL 408415, at *6 (Miss. Feb. 23, 2006) (analyzing arbitrability of business-tort claims under the touch-matters test).

appeals have rejected attempts to evade arbitration by artfully pleading, as torts, claims relating to the parties' contractual o business relationships. See, *e.g.*, *Fyrnetics (H.K.) Ltd.* v *Quantum Group, Inc.*, 293 F.3d 1023, 1030 (CA7 2002 (rejecting attempt to avoid arbitration by casting allegation as torts of negligence and misrepresentation); *Pennzoi Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (CA5 1998) (holding that a broad arbitratio agreement "embrace[s] all disputes between the partie having a significant relationship to the contract regardless o the label attached to the dispute"); *Gregory* v. *Electro-Mech Corp.*, 83 F.3d 382, 384 (CA11 1996) ("Whether a claim fall within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the lega causes of action asserted.").[4]

The Ohio Supreme Court purported to reject artful pleading as a means to evade arbitration, App. 18a, yet its opinion promotes that detrimental result by adopting a standard tha hinges arbitrability on whether the complaint reference the contract containing the arbitration clause. The touch-matters test, by contrast, looks to the substance of the plaintiff's claims and does not have the practical effect of the Ohio decision, which effectively limits arbitration to breach-of-contract claims.

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[4] Moreover, when, as in this case, the arbitration agreement is broad, courts have declined to carve out categories of claims from the expansive scope of the parties' arbitration agreement. See *Brown* v. *ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221 (CA11 2000) (explaining that use of the phrase "any dispute" in an arbitration agreement means that the "parties agreed to arbitrate any and all claims against each other, with no exceptions"); see also, *e.g.*, *Genesco*, 815 F.2d, at 846.

C. Ohio's Standard Conflicts with the Court's Recognition of the Arbitrability of Antitrust Claims Generally and with the Second Circuit's Analysis of Price-Fixing Conspiracy Claims Specifically.

Ohio's contract-reference test effectively excludes antitrust claims from traditional arbitrability analysis, contravening the Court's longstanding precedent that such claims—indeed, statutory claims generally—are arbitrable. See, *e.g.*, *PacifiCare*, 538 U.S., at 405-406 (RICO claims); *Gilmer*, 500 U.S., at 26 (ADEA claims); *McMahon*, 482 U.S., at 230-233 (RICO and Securities Exchange Act claims); *Mitsubishi*, 473 U.S., at 627, 632-637 (international antitrust claims).

Since *Mitsubishi*, the federal courts of appeals have uniformly held that antitrust claims are arbitrable. See, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *DaimlerChrysler Motors Corp.*, 271 F.3d 6, 11 (CA1 2001); *Kotam Elecs., Inc.* v. *JBI Consumer Prods., Inc.*, 93 F.3d 724, 726-727 (CA11 1996) (en banc); *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441-1442 (CA9 1994). Moreover, federal district courts and state courts have compelled arbitration of antitrust claims. See, *e.g.*, *N.Y. Cross Harbor R.R. Terminal Corp.* v. *Consol. Rail Corp.*, 72 F.Supp.2d 70 (EDNY 1998); *Hunt* v. *Up N. Plastics, Inc.*, 980 F.Supp. 1046 (Minn. 1997); *Crown Homes, Inc.* v. *Landes*, 27 Cal.Rptr.2d 827, 834 (Cal. App. 1994). By creating a narrow arbitrability test for statutory causes of action that, as a practical matter, will render them nonarbitrable in virtually every case, the Ohio and Kentucky courts' decisions—like prior Texas and South Carolina opinions—conflict with this Court's and the lower federal and state courts' accepted recognition that antitrust claims are arbitrable under the same conditions as other claims: when they touch matters within the scope of the parties' arbitration agreement.

Moreover, the Ohio and Kentucky opinions conflict no only generally with the "touch matters" test from *Mitsubish* and its progeny, but also specifically with the Secon Circuit's decision in *JLM Industries, Inc.* v. *Stolt-Nielse S.A.*, 387 F.3d 163 (CA2 2004), which used the touch-matter standard to determine the arbitrability of price-fixing con spiracy claims against ocean carriers whom the plaintiff alleged exploited their market power to fix worldwid shipping rates. *Id.*, at 167-168, 172-173. Analyzing precisel the type of dispute that this case presents, the Second Circui reversed the trial court's ruling that the claims wer nonarbitrable because they could be proven without reliance on the parties' contracts. *Id.*, at 168.

The Second Circuit acknowledged that the price-fixing conspiracy allegations "rest[ed] on factual allegations whic concern matters beyond the making of a particular contrac between the parties and the performance of its terms" and therefore "will not focus exclusively 'upon the parties' conduct under the terms of the charter.'" *Id.*, at 175. Nonetheless, the court reasoned that the plaintiffs could not have suffered the damages from the alleged price fixing had they not entered into the contracts, "each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.'" *Ibid.* Accordingly, the price-fixing claims, though alleged as extra-contractual, arose out of the contracts and fell within the parties' broad arbitration agreements. *Id.*, at 176 (holding that antitrust disputes "unquestionably involve a core issue of the contracts between the parties—allegations that the price terms set forth in those contracts have been artificially inflated as a result of the price-fixing conspiracy").[5]

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[5] A district court within the Second Circuit similarly applied the touch-matters standard in determining the arbitrability of claims alleging that banks engaged in price fixing regarding currency conversion fees when cardholders conducted foreign currency transactions with their credit

Under *JLM*'s reasoning, the price-fixing allegations in this case would fall plainly within the scope of the parties' arbitration agreement, which the Ohio Supreme Court acknowledged was broad. App. 17a. The court, however, violated fundamental arbitrability principles by paying lip service to, but disregarding in practice, the requirement that courts construe arbitration agreements in favor of arbitration. App. 16a; see, *e.g.*, *Mitsubishi*, 473 U.S., at 625; *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985). Under the FAA, any doubts about arbitrability must be resolved in favor of coverage, and arbitration must be compelled unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 589 (1960); see also *Moses H. Cone*, 460 U.S., at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Despite its duty to construe the United arbitration agreements broadly under the Court's precedent, the Ohio Supreme Court's impermissibly constrictive scope analysis defeated the parties' agreement to arbitrate all disputes "about their business relationship." See App. 12a, 17a. Under a proper analysis, as the dissent observed, respondents' price-fixing conspiracy allegations plainly touch matters concerning the parties' business relationship because the parties' contracts "allegedly contain the evidence of anti-competitive conduct and financial harm" and "the reimbursement rates allegedly implicating unlawful restraint." App. 24a. Accordingly, the dissent reasoned, "[t]he antitrust conspiracy claims relate to

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cards and the fixed prices appeared on the credit card accounts. *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 406, 410 (SDNY 2003). The court held that the claims were arbitrable because the terms of plaintiffs' use of the credit-card accounts were governed by the cardholder agreements containing the arbitration clause. *Ibid.*

the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship between the physicians and United Healthcare." *Ibid.* Indeed, the dissent's analysis closely mirrors that of the Second Circuit in *JLM.* 387 F.3d, at 175-176.

Because the price-fixing conspiracy allegations necessarily center on the parties' business relationship, the Ohio Supreme Court's refusal to compel arbitration and its creation of a distinct, narrow arbitrability standard for statutory and tort claims reflect a revived judicial hostility to arbitration that is compounded by Kentucky's adoption of the identical restrictive standard. In light of this state-court trend—which includes similar holdings from Texas and South Carolina[6]—the Court should grant the petition to clarify whether, as *Mitsubishi* and *McMahon* indicated, 482 U.S., at 225-226; 473 U.S., at 626-627, the FAA, the national policy favoring arbitration, and this Court's directive to faithfully enforce the negotiated terms of parties' arbitration agreements apply equally to motions to compel arbitration of statutory claims or whether, as Ohio and Kentucky concluded, courts should enforce arbitration rights only when the elements of such claims expressly reference the contract in question.

II. THE OHIO SUPREME COURT'S HOSTILITY TO ARBITRATION INVITES GAMESMANSHIP AND FORUM SHOPPING.

By focusing on the formal elements of claims to the exclusion of textual analysis of parties' arbitration agreements, the Ohio Supreme Court's restrictive standard improperly encourages gamesmanship by tying the scope-of-arbitrability determination to the formalities of a plaintiff's pleadings, which can be creatively drafted to avoid reference to the relevant contract and thus permit plaintiffs to evade

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[6] See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

arbitration. Rather than ensuring the enforcement of valid arbitration agreements, as Congress mandated in the FAA, the Ohio standard creates a safe harbor for parties who wish to breach their obligation to arbitrate, authorizing plaintiffs to do precisely what other courts have forbidden: escape arbitration commitments by recasting a dispute in tort or as a statutory violation. See, *e.g.*, *Fazio*, 340 F.3d, at 395 (holding that a party cannot avoid arbitration simply by framing its action in tort); *Fyrnetics*, 293 F.3d, at 1030 (rejecting attempt to avoid arbitration by casting allegations as torts of negligence and misrepresentation). In other words, the decision effectively creates a zone of nonarbitrability for plaintiffs sufficiently sophisticated to plead their claims as statutory or tort claims, rather than directly as contractual violations.

This dangerous erosion of arbitration rights, exacerbated by Kentucky's adoption of the Ohio standard, will encourage forum shopping and generate jurisdictional disputes when parties seeking to escape arbitration obligations target Ohio and Kentucky state courts, while those wishing to enforce arbitration agreements attempt to be heard in federal court or other state courts.[7] The Court should grant the petition to reaffirm that arbitrability depends on the language of parties' agreements, not the forum chosen.

Additionally, by departing from traditional scope analysis in favor of a new contract-reference test, the Ohio and Kentucky decisions will create confusion and uncertainty over the availability of arbitration for statutory and tort claims. For countless contracts containing broad arbitration clauses like respondents' agreements with United, the Ohio and Kentucky decisions will upset parties' settled, and

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[7] South Carolina and Texas courts' implementation of the same arbitrability test makes additional inroads on arbitration rights and further demonstrates the need for review of the arbitrability standard for non-contractual claims. See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

reasonable, expectations that courts will honor their carefully negotiated agreements. By effectively excluding statutory and tort claims from arbitration regardless of the language parties include in their arbitration agreements, the Ohio and Kentucky *opinions also introduce unavoidable unpredictability* for parties negotiating contracts that reflect broad agreements to arbitrate but rely on Ohio or Kentucky law. Indeed, these decisions may deter parties seeking broad arbitration agreements from entering into agreements governed by Ohio or Kentucky law.

The Kentucky and Ohio opinions, unless addressed by the Court, stand as an open invitation to other courts that have never fully embraced arbitration and now have ammunition to disparately treat motions to compel arbitration of claims other than breach of contract. This trend dangerously threatens the FAA's arbitral protections and the strong national policy favoring arbitration in two significant respects. First, it will undermine Congress's primary goal of permitting parties to avoid litigation by honoring their agreements not to litigate certain—or all—disputes between them. See, *e.g.*, *Southland*, 465 U.S., at 7 (noting that one party's avoidance of arbitration may lead to protracted litigation, "one of the very risks the parties, by contracting for arbitration, sought to eliminate"). Second, these opinions, if unreviewed, will signal that no consequences lie for a court that egregiously deviates from Congress's clearly expressed will in enacting the FAA. See *supra* Part I.A.

Because the Ohio Supreme Court's arbitrability standard, and its adoption by Kentucky, undermines the national policy favoring arbitration, dramatically departs from established federal precedent, and eviscerates parties' contractual rights while also establishing an incentive for litigants to use the Ohio and Kentucky courts in a manner inconsistent with the FAA, the Court should grant the petition and determine whether statutory claims must be arbitrated only when they

reference the underlying contract or whether, consistent with arbitrability principles governing all other categories of claims, courts must compel arbitration when allegations touch matters within the scope of the parties' arbitration agreement.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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May 16, 2006